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Parliamentary Joint Committee on Intelligence and Security
Electronic submission

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Dear Committee

Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill

Thank you for the opportunity to make this submission. In sum, it argues that:

1. **The Bill could undermine international and Australian security**, including the United Nation's Security Council's global counter-terrorism cooperation; it also irresponsibly shifts the burden of Australian terrorists onto other countries.
2. **The grounds for loss of citizenship are excessive and rights-infringing**, including by targeting conduct that does not concern allegiance to Australia at all, and conduct that is minor, defensible, or even desirable. The Bill also fails to take into account important countervailing considerations; and rests on a strained analogy with treason offences that is entirely inappropriate.
3. **The procedures for losing citizenship lack procedural fairness and judicial safeguards**; involve excessive and unprincipled executive discretion; are likely to produce bad and unaccountable decisions; and do not satisfy the principles of legality, human rights, and the rule of law.
4. **The Bill infringes the customary international law rule that deprivation of nationality must not be arbitrary**.

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1. The Bill would undermine international and Australian security

The Bill facilitates terrorism and encourages impunity for terrorist crimes

Stripping citizenship is intended to preclude a person's right of re-entry to Australia or to enable a person's expulsion from Australia. The consequence is that Australian 'terrorists' may remain free to commit terrorism overseas and enjoy an increased likelihood of impunity for their crimes.

Foreign fighters who wish to return to Australia would no longer be subject to law enforcement measures in Australia designed to neutralize or contain the threat they pose, such as by arrest, prosecution and imprisonment; imposition of anti-terrorism control orders; surveillance; or deradicalization and rehabilitation strategies.

Foreign fighters who wish to remain overseas would no longer be subject to efforts by Australian law enforcement to secure their return to face justice in Australia, such as by extradition, mutual legal assistance, or removal/deportation to Australia.

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Stripping citizenship thus undermines international security because it reduces Australian law enforcement and intelligence efforts to locate and bring to justice Australian terrorists; and irresponsibly shifts the burden of dealing with Australian terrorists onto other countries.

It also threatens Australian national security because Australian terrorists would remain free to plot attacks against Australian interests abroad, including Australian embassies and diplomats, tourists and business people, and companies. Such terrorists also remain free to radicalize, recruit, and train others within Australia through the internet.

In many cases, a person's other country of nationality may not have effective or functioning law enforcement authorities that are capable of bringing the person to justice. In some cases, this is because such countries are failed or failing states, or in the midst of conflicts (such as Syria and Iraq). In other cases this may be because countries are not governed by the rule of law or lack justice systems that provide a fair trial.

The Bill's approach is also inconsistent with Australia's international counter-terrorism obligations, which are built on global coordination and cooperation to suppress terrorism, not unilateral measures designed to make one country safer at the expense of others, and which shift the burden of 'our' terrorists onto other countries.

The Bill is inconsistent with Australia's international counter-terrorism obligations

Under Security Council resolution 1373 (2001), Australia, like all states, is required to criminalize terrorist acts, bring terrorists to justice, and prevent the cross-border movement of terrorists. Australia is also a party to numerous counter-terrorism conventions since the 1960s, which require Australia to 'prosecute or extradite' terrorists so that they face justice and do not enjoy impunity. Australia is specifically required by many of the treaties to establish jurisdiction over crimes by its nationals – and is expected not to unilaterally strip nationality to avoid these obligations.

Unilaterally stripping citizenship undermines these obligations. Where a person stripped of citizenship is in Australia, they may be expelled to their other country of nationality without any guarantees that the person will be subject to prosecution or appropriate law enforcement measures in that country – thus allowing the cross-border movement of terrorists and impunity for terrorist crimes. Where a person is already overseas, the Bill does not require that their other country of nationality will readmit them in practice or otherwise take responsibility for suppressing terrorist conduct.

There is no evidence the Bill would deter terrorists

The Bill is also ostensibly justified as a deterrent to would-be Australian terrorists. However, no evidence is presented that loss of citizenship would deter Australians from becoming involved with terrorism. If the existing criminal offences carrying penalties of life imprisonment – and the threat of death by military operations overseas – do not deter significant numbers of Australians from fighting overseas, it is hard to see why loss of Australian citizenship would provide anything more than marginal deterrence. One could equally speculate the stripping citizenship (at least, how this Bill does it) will be seen as unfair and extreme and thus radicalize, for instance, those fighting against Syria to turn against Australia; or radicalize others to turn to terrorism for the first time.

2. The grounds of loss of citizenship are excessive and rights-infringing

The Bill strips citizenship for conduct unrelated to lack of allegiance to Australia

The Bill broadly justifies stripping citizenship on the basis that the specified conduct demonstrates that a person has 'severed' their bond with and 'repudiated their allegiance to Australia' (Explanatory Memorandum, p. 2). However, much of the conduct in question does not repudiate allegiance to Australia at all. The analogy with stripping terrorism for treason is entirely inappropriate, because treason concerns the violent overthrow of the Australian government. In contrast, the Bill is not limited to terrorism and foreign incursion that threatens Australia, such as by targeting Australians here or overseas, or fighting against Australian forces. Instead it encompasses any 'terrorism' or incursion – even legitimate resistance to governments that commit genocide, war crimes, crimes against humanity and so on. Under the Bill, Hitler's assassin or Nelson Mandela would be stripped of citizenship (if they had another).

The Bill strips citizenship for conduct that is minor, defensible, or even desirable

By relying largely on a list of terrorist and foreign incursions offences, the Bill compounds the many defects in those offences that have previously been pointed out.[1] The United Nations Human Rights Committee and the UN Special Rapporteur on terrorism and human rights have criticised Australia's terrorism definition as vague, overbroad and rights-infringing.[2] Some offences go too far and do not justify loss of citizenship. The Bill thus strips citizenship for desirable conduct (such as medical care or humanitarian training), acts that are legitimate or defensible (such as stopping genocide or fighting according to the laws of war), and certain minor or trivial acts.

Both the terrorism and foreign incursions offences criminalize hostilities by non-state forces in armed conflict, even if they only target military forces and spare civilians, and fight in accordance with international humanitarian law. They make no exception for resistance against authoritarian or even genocidal regimes, including those – such as Assad in Syria – which Australia opposes. They make all war fighting against governments illegal and criminal, even where it does not concern Australia.

Further, the Australian offences criminalize even conduct that is highly desirable in armed conflict and protected under the Geneva Conventions of 1949. Thus providing medical care to wounded fighters in Syria or Iraq could amount to the Australian offence of providing support to a terrorist organisation. All wounded people *hors de combat* ('out of combat'), whether Nazi soldiers or so-called 'terrorists', have a right to basic medical care because they are human beings entitled to humane treatment. Stripping citizenship from those who provide medical care is entirely indefensible. Financing such medical care can also be an offence.

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[1] Eg, Ben Saul, Submission to the COAG Review of Counter-Terrorism Legislation, 4 December 2012, http://www.ag.gov.au/Consultations/Documents/COAGCTReview/Professor%20Ben%20Saul.PDF.

[2] UNHRC, Concluding Observations: Australia, CCPR/C/AUS/CO/5, 7 May 2009, para. 11; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Australia: Study on human rights compliance while countering terrorism, 14 December 2006, A/HRC/4/26/Add.3, paras. 15-17.

The terrorist offences also criminalize other desirable conduct. For instance, any training provided to a terrorist organisation is a criminal offence, not only training to commit terrorism. It is thus an offence to train members of a terrorist organisation to understand international humanitarian law or human rights treaties, or in conflict mediation and resolution, or training in basic medical first aid. Unfathomably, there is no exception to this offence. Both the Sheller Committee and the Parliamentary Joint Committee on Security in 2006 criticised the criminalisation of "innocent" training which does not support terrorist activities. Such conduct could also fall within the recent offence of entering a declared area. Stripping citizenship in such cases is indefensible. Other offences are also vague and may not less serious, such as advocating terrorism.

Additionally, most terrorist offences are nothing like the gravity of 9/11, but encompass conduct which, but for a coercive/intimidatory intent and political motive, would normally be treated as ordinary crimes of violence against people or property. Australia's terrorism offences further criminalize a wide array of preparatory conduct that would not ordinarily even be criminal. As the next section shows, the Bill requires no proportionality assessment to differentiate between serious and less serious acts.

The Bill does not weigh the seriousness of the conduct or other relevant factors

The Bill does not require any assessment of whether a particular terrorist act or foreign incursion (or other offence) is serious enough so as to warrant stripping citizenship. In particular, there is no duty to consider whether a particular act would, upon criminal conviction, likely attract a penalty at the lower, middle or upper range of the sentencing spectrum, which in a given case could vary from no imprisonment to life in prison. The Bill bluntly assumes that any of the listed offences are automatically sufficiently serious to justify loss of citizenship, regardless of the circumstances or gravity of the act.

In addition, the Bill does not require any weighing of the seriousness of the person's conduct against other relevant factors, such as: the person's attachment to, roots in, and contributions to Australian society, including the impact on their family life; whether the person has any meaningful connection with their other country of nationality, or whether such citizenship is purely formal; their prospects of rehabilitation; and their potential contribution towards the deradicalization of others. The Bill just simplistically lumps together a wide variety of disparate conduct of varying gravity as automatically deserving of loss of citizenship, and irrespective of other relevant considerations.

More serious crimes are rightly prosecuted and citizenship is not stripped

At the same time, the grounds for stripping citizenship are unbalanced or asymmetrical in that they largely target non-state violence but ignore atrocious state violence. For instance, a Syrian-Australian who donated money to the Assad Government for the purpose of dropping barrel bombs or chemical weapons on innocent civilians could not be stripped of citizenship. Ditto someone who financed a state genocide. Likewise an Australian who fights in national armed forces not at war with Australia, and commits war crimes or crimes against humanity against civilians, could not lose citizenship – even for exterminating civilians, or running concentration or slave camps.

The point is not to encourage the Bill to widen the grounds of stripping citizenship, but to show that many crimes are more harmful than what Australian law defines as 'terrorism' or 'foreign incursion', including, for instance, crimes of genocide, war

crimes, torture, crimes against humanity and other serious human rights violations. Even many domestic crimes – such as murder or rape – may be more serious than some terrorist offences (such as humanitarian relief donations to a de facto state authority in a civil war classed as 'terrorist') or incursion offences (such as fighting to overthrow a genocidal government). In all of these cases, Australian law has always regarded it as sufficient to prosecute and punish offenders by applying the regular criminal law – not stripping them of citizenship, which may give them impunity for their crimes.

The analogy with treason is inappropriate

The analogy with treason is inappropriate because that typically involves stripping citizenship of a dual national who has committed treason against Australia *on behalf of their other country of nationality*. In other words, *the person chooses to advance the security of their other country over Australia's*.

In contrast, Australians involved in terrorism or foreign incursion are typically not acting in the interests of their other country of nationality, whether because they are fighting *against* their other government (such as Syria or Iraq) or their other country is not involved at all (as where a person is, for instance, a Lebanese or Egyptian national fighting in Syria or Iraq). At law no-one is a 'citizen' of the Islamic 'State'. There is, therefore, no possibility of divided loyalty or choice of allegiance to one state of nationality over the other state of nationality. The Bill thus turns dual nationals into second class citizens, for reasons that are not based on a rational distinction between sole and dual citizens (such as a treasonous choice of one country over the other).

3. The procedures for loss of citizenship are unfair and arbitrary

Loss of citizenship should only follow from a criminal conviction by a court

Loss of citizenship involves amongst the most serious legal consequences for any person, including permanent removal from a person's place of residence, community, family, workplace and other bonds of settled life. As such, any decision to strip citizenship should involve rigorous and effective procedural safeguards, including due process and independent, impartial decision-makers. Procedural safeguards not only protect the interests of the person but also ensure that decisions are correct and public confidence is maintained.

A decision to strip citizenship should only ever follow a criminal conviction by a court. Loss of citizenship should not automatically follow from conviction, but require a further administrative decision affording procedural fairness and accompanied by effective judicial review. The Bill fails to provide these minimum protections.

Procedural safeguards are inadequate given the seriousness of loss of citizenship

It is acknowledged that national security considerations may properly affect the content and form of procedural fairness in a given context. However, loss of citizenship can entail consequences as serious or more serious than a criminal conviction, and as such the procedural protections should approach those of a criminal trial, where a high level of disclosure of evidence is demanded even in national security cases.

While some of the Bill's grounds for loss of citizenship have been described as 'self-executing', the reality is that the provisions have no practical effect until the Minister makes an administrative decision to give notice to that effect. The Bill's procedures do not accord adequate procedural fairness for the following reasons:

- In the absence of a criminal conviction, the Minister's decision about whether a person has committed the specified conduct requires the Minister to consider highly complex matters of fact and law. These include legal issues on which the jurisprudence is unsettled or contested, including how the complex, multi-pronged definitions of terrorist offences apply in given cases. They also include serious questions concerning the reliability of evidence or intelligence whose admissibility would ordinarily be subject to challenge in criminal proceedings. The risk of serious error is magnified by the inability of the affected person to know or challenge the Minister's legal reasoning prior to notice being given; and the absence of any right to be legally represented in the process.
- Ministerial notice need not be effective or even require reasonable steps to be taken to make the person aware of decision; all that is required is that the Minister must give notice 'at such time and to such persons as the Minister considers appropriate'.
- The rules of natural justice do not apply to the Minister's powers. As such, there is no requirement to inform the person of the basis of the decision or disclose relevant evidence or any summary thereof purportedly supporting it; and no requirement to give a person a meaningful opportunity to be heard.
- The Minister's decision need not be based on a full security assessment from ASIO, but may be based on partial, incomplete and untested intelligence, which may be unreliable, highly prejudicial to the person, and unable to be challenged by the person, all magnifying the chance of error. The Minister is not expert in national security yet may substitute him or herself for the expertise of ASIO.
- No merits review before an independent tribunal is available to test the facts.

Judicial review is likely to be substantially ineffective

While judicial review for errors of law technically remains available, it is highly likely to be largely ineffective in practice. The affected person would be unlikely to be able to compel the disclosure of the critical evidence or intelligence upon which the decision was based, so as to be able to identify any legal errors in the Minister's use of it. The Bill itself does not provide for adequate disclosure; procedural fairness at common law would likely be reduced to 'nothingness' at common law because of the statute;[3] other legislation on the protection of security sensitive information would also be available to limit disclosure; and public interest immunity could prevent admissibility in court at all.[4] Judicial review also cannot consider the substantive merits of the Minister's decision. As the UN Human Rights Committee found in the cases of *FKAG v Australia* (2013) and *MMM v Australia* (2013), such inadequate disclosure in Australian national security cases does not satisfy Australia's international human rights law obligations.

[3] *Leghaei v Director General of Security* [2005] FCA 1576, [88]; affirmed in *Leghaei v Director-General of Security* [2007] FCAFC 37, [55].
[4] See Ben Saul, 'Security and Fairness in Australian Public Law' in Matthew Groves (ed), *The Cambridge Companion to Australian Administration Law* (Cambridge, 2014), 93-118.

Discretionary Ministerial exemption is contrary to the rule of law

The availability of Ministerial exemptions may moderate the strictness of the Bill. It is, however, contrary to the rule of law. The power is non-compellable and does not confer any legal right upon a person to invoke it. As such, it operates as a complete ministerial discretion, and is not constrained by natural justice even when it is exercised.

In consequence, a dual citizen's liability to loss of citizenship is rendered highly unpredictable and dependent on the unknowable intentions of the Minister; a person cannot readily and prospectively know the scope of their legal liabilities. Further, the public at large can have no confidence that loss of citizenship will only operate in the most serious cases warranting its loss; whether the Minister will utilize the power in a consistent and defensible way, treating like cases alike; or whether it will be approached randomly, arbitrarily, selectively, partially, subjectively, politically, or capriciously, or relying on irrelevant factors. While a 'public interest' structures the power when it is exercised, there is little constraint on the initial decision whether to exercise it at all. Terrorists just become whoever politicians say they are.

The dangers inherent the power are heightened by the Bill's questionable and simplistic assumption that the 'Minister represents the Australian community' and knows its 'values' (Explanatory Memorandum, p. 17), when these are diverse and contested.

Ministerial declaration of terrorist organisations is contrary to the rule of law

In some situations the Bill makes loss of citizenship dependent on the declaration of an organisation as terrorist. This power is inconsistent with the rule of law. The declaration of organisations as terrorist should be a judicial not executive function, for the same reasons that previous inquiries have recommended in other contexts. It is an adjudication of liability that has serious legal consequences and should more appropriately be made by a court and accompanied by stringent judicial safeguards. Executive declaration politicises legal liability by allowing a politician to pick and choose which group is terrorist, regardless of whether an organisation actually meets the legal criteria in the Criminal Code for being a terrorist organisation. This undermines public confidence that counter-terrorism law is being applied neutrally and apolitically. Terrorists just become whoever politicians say they are.

In this sense the Bill compounds the folly of the existing executive powers to declare terrorist organisations more generally. However, it also worsens the situation by introducing conflicting lists of terrorist organisations in federal law. From a rule of law standpoint this creates confusion about legal liabilities and suggests to Australians that some listed terrorist organisations deserve loss of citizenship but not others – even though all the relevant organisations may be listed as terrorist. It ultimately renders loss of citizenship unpredictable, arbitrary and unforeseeable, infringing legality.

Children's rights are not adequately protected

The Bill treats 'child terrorists' (under 18 years of age) no differently than adult terrorists. This is unreasonable and inconsistent with Australia's international human rights obligations. Child terrorists are victims and deserve protection and rehabilitation, not banishment. Under Article 7(1) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000), 'States

parties shall cooperate… in the rehabilitation and social integration of persons who are victims' as child soldiers. Australia has been a party to the Convention since 26 September 2006. Most 'child terrorists' in Syria and Iraq, if they are engaged in hostilities with armed groups, would be child soldiers entitled to such protection.

While children whose parents are terrorists would not automatically be stripped of their own citizenship, the Explanatory Memorandum notes that the Minister could discretionarily revoke their citizenship after taking into account their best interests. However, if a parent is a terrorist deserving to lose citizenship, it is extremely difficult to see how it would ever be in the best interests of the child to remain with such a parent. Rather, in such cases removal from the parent and child protection measures – in Australia, or overseas with non-terrorist family members – would be appropriate.

Permanent loss of citizenship is excessively harsh

The Bill provides for permanent loss of citizenship. It thus rests on the spurious assumption that 'once a terrorist, always a terrorist'. This provision is too harsh. Humane legal systems are premised on the prospect of rehabilitation – that it is a proper function or law to correct bad behaviour and provide pathways for errant individuals to reintegrate themselves into society. Permanent exile or banishment is archaic; Nelson Mandela would never have been President of South Africa.

Retrospective application is contrary to the rule of law

In a decent liberal democracy respectful of basic rights and the rule of law, it goes without saying that retrospective liability runs counter to the principle of legality, namely that a person ought to be able to know the scope of their legal liabilities at the time of the commission of the conduct in question.

4. Other international law and policy considerations

Under international law, states enjoy considerable freedom in regulating loss of nationality. It is not, however, a complete discretion, and is subject to the obligation not to make a person stateless (which itself is subject to exceptions, none of which is relevant to the present Bill) – which this Bill does not formally do.[5]

It is also a rule of customary international law that a person must not be arbitrarily deprived of their nationality.[6] For the reasons above, the Bill fails that test.

Additionally, as a matter of principled policy, Australia should refrain from stripping nationality where: (1) the person's other nationality is ineffective or unavailable in practice; and (2) the person has weaker links to their other country than to Australia.
The first consideration ensures a person is not left without the effective protection of another government, including by ensuring that the other country of nationality will agree to readmit their national and provide travel documents to facilitate this.

[5] Convention on the Reduction of Statelessness 1954, article 8.
[6] James Crawford, *Brownlie's Principles of Public International Law* (Oxford, 2008), 522; Universal Declaration of Human Rights 1948, article 15(1); Eritrean-Ethiopian Claims Commission, *Civilians Claim, Eritrea's Claims 15, 16, 23 and 27-32* (2004) International Law Reports 374, 397-8; Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th ed, vol II, Pearson, Delhi, 1996), 878-9.

The second consideration properly allocates responsibility for dealing with terrorism to the country to which the person is most closely connected and which 'produced' the terrorist. Why, for instance, should Lebanon be responsible for a dual national who has spent their entire life in Australia, does not speak Arabic, and has no links to Lebanon – just because Australia stripped their citizenship first?

Such scenario highlights the further risk that stripping citizenship may be seen as an unfriendly act by an innocent foreign country and damage international relations. It also potentially triggers an 'arms race' between countries to strip citizenship before the other country of nationality does – raising a real prospect of statelessness – and undermining cooperative, coordinated global counter-terrorism efforts.

Finally, it should be emphasised that other relevant international human rights protections still apply to a person who has lost citizenship. In particular: (1) a person must not be returned to the death penalty or other arbitrary deprivation of life, persecution, or cruel, inhuman or degrading treatment or punishment; (2) those who are non-removable (for any of those reasons, or because their other country of nationality will not re-admit them) must not be subject to illegal indefinite detention.[7]

Conclusion

For a democracy ostensibly committed to liberal values, basic rights and the rule of law, this Bill is particularly bad, even by the low standards of some other Australian counter-terrorism laws. It should not be passed; it cannot be easily rectified. It strips citizenship too easily and unjustifiably; it renders citizenship arbitrary and unpredictable and politicises it; its procedures are manifestly defective; it gives too much unprincipled power, with too little constraint, to the executive; it infringes basic principles of the rule of law, legality, and procedural fairness; it lacks accountability for the administrative exercise of invasive powers; it will inevitably produce bad or mistaken decisions; it will undermine public confidence in the legal system; its violates children's rights; it is likely to counter-productively endanger Australian and international security; and it will compromise Australia's international relations and global cooperation on terrorism.

Exiling or banishing Australian wrongdoers is primitive, medieval, simplistic, and dangerous. My own view is that citizenship should only be stripped following a criminal conviction, and where a person's conduct seriously threatens Australia's national security, or the person obtained citizenship fraudulently. In all other cases, Australia should take responsibility for its own wrongdoers – terrorism is an Australian-produced phenomenon too – by punishing or rehabilitating them. Australia should not dump its terrorists on other, often innocent, countries, and facilitate Australians to keep killing innocent people in other countries, particularly where a person is more closely connected to Australia than the other country of nationality.

Yours sincerely

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[7] *FKAG v Australia*, UNHRC Communication 2094/2011 (August 2013); *MMM v Australia*, UNHRC Communication 2136/2012 (August 2013).